

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

LOCAL 547, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO
(COUNTY CONNECTION OF MIDLAND)

and

Case 7-CB-15144

BARBARA NAUGLE, An Individual

Jennifer Y. Brazeal, Esq. for the General Counsel.
J. Douglas Korney, Esq., of Farmington Hills, MI,
for the Respondent.
Gary Patterson, Esq., of Saginaw, MI, for the Employer.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge. This case was tried in Midland, Michigan on July 18, 2006. The charge was filed by Barbara Naugle (Charging Party) on March 30, 2006¹ against Local 547, International Union of Operating Engineers, AFL-CIO (Union or Respondent). The complaint was issued May 11 alleging that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended, (Act) by on March 11 putting the Charging Party's issue of her assigned seniority/hiring date to a vote of Respondent's membership who are employed by the same employer as Charging Party and accepting their vote as its position on the issue where it could be foreseen and assumed that the employees would vote their self interest, thereby breaching its duty of fair representation by delegating its responsibility as the exclusive collective bargaining representative to its membership. Respondent denies violating the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

County Connection of Midland (Employer or CCM), a non-profit limited liability corporation with an office and place of business in Midland, has been engaged in the business of providing transportation services for passengers. The complaint alleges, it is stipulated, and I find that during the calendar year 2005, a representative period, the Employer, in conducting its business operations derived gross revenues in excess of \$500,000 and purchased goods and supplies valued in excess of \$50,000 from suppliers within the State of Michigan, each of which purchases these goods and supplies from outside the State of Michigan and had them shipped

¹ All dates are in 2006 unless otherwise indicated.

directly to its Michigan facility; and that at all material times, the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

Naugle testified that she began her employment as a bus driver with the Employer, which is a public transportation service, on August 30, 2000; that at the time of the trial herein she was employed by the Employer as a part-time bus driver; that since October 2000 she has also been employed by Education and Training Connection of Midland (ETCM) as a school bus driver for preschoolers, high schoolers and on field trips; and that there is some connection between the Employer and ETCM "[t]hey're connected but not connected," (transcript page 13)].

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The Union was certified as the collective bargaining representative of the Employer's bus drivers (including one maintenance/bus driver) in 2001.

Naugle's employment at CCM was interrupted in January 2002 when the CCM's manager, Robert Falsing, did not give her any hours on the schedule, she asked him why, and he told her that he guessed she was laid off because he needed the hours for part-time people. Naugle never received anything in writing indicating that she was laid off or terminated.

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In December 2002 Naugle was recalled from her layoff by CCM. She testified that she was laid off from ETCM and taken back by CCM to do the same job; that she attended a meeting in late November 2002 in Falsing's office with Jan Pickering, who is in Human Resources, Jennifer Holet, and Kathy Farison; that at that time she, Holet, and Farison, who were doing school bus routes for ETCM, were told by Falsing that they were being laid off from ETCM, CCM would be picking those passengers back up, and she, Holet, and Farison would be recalled at CCM; that she was recalled by CCM in December 2002; and that a seniority list is posted in the break room at CCM and while her date of hire on the seniority list was August 30, 2000 before she was laid off, her date of hire on the seniority list was December 2, 2002 after she was recalled.

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Naugle testified that in early summer 2003 she spoke to the Union about her December 2, 2002 seniority date while attending a meeting at the union hall during negotiations on a collective-bargaining agreement; that during the meeting she said that she had never quit her job and she felt that her seniority date should be 2000 and not 2002, and it should be 2000 on the seniority list; that present at this meeting were Dan McCarthy, who is a union representative, Doug something, who was a union representative,² Roger Deitrick, who is a union steward, Bill Gunther, who is a union steward, and Carmen Fradenburgh, who was on the bargaining committee; that there were also 10 to 15 employees present at this meeting; that Doug said that there were some issues with two other employees that were trying to get their seniority reinstated to where it was and it was being presented as a package, "all three of us were together as a package on the bargaining" (transcript page 21); that it was her understanding that "there were three of us that were trying to get our seniority to - - back to our original hire dates and that it was all being presented as the three of us as a bargaining committee package and it would be - - have to be all or none" (Id. at 22); and that this was during bargaining for the first collective-bargaining agreement.

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² As indicated below, McCarthy's Local Union predecessor was Doug Fogleman.

In June 2003 Naugle asked Deitrick what was going on with the negotiations for the seniority and he told her that seniority was not going to be reinstated and it was going to stay the way it was; she would have a seniority date of December 2, 2002.

In October 2003 the first collective-bargaining agreement between the Union and CCM, General Counsel's Exhibit 2, went into effect. It remains in effect until September 30. As here pertinent it reads in part as follows:

ARTICLE IX
SENIORITY

Section 9.1 - Definition. Seniority shall be defined as length of continuous service within the bargaining unit from the employee's most recent date of hire.

....

Section 9.3 - Loss of Seniority. An employee shall lose his seniority for any of the following reasons:

.... g. Layoff for a continuous period of twelve (12) months or the employee's seniority, whichever is less.

....

Section 9.6 - Seniority Lists. The seniority list on the day of this Agreement will show a date of hire, names and job titles of all employees in the unit entitled to seniority. The seniority list will be kept up-to-date and copies will be provided to the Union upon request from a Union official.

The seniority list attached to the collective-bargaining agreement as "APPENDIX A" specifies "12/2/02" for the "Hire Date" of Naugle. McCarthy testified that the original collective-bargaining agreement was submitted to the membership for approval and the seniority list, Appendix A, was attached when it was submitted to the membership for approval. When asked whether he was present when the parties negotiated about the seniority dates for this, the first collective-bargaining agreement between the Union and CCM, McCarthy testified as follows:

JUDGE WEST; Okay. Were you present for that - - those negotiations where that discussion was held?

THE WITNESS: it was obvious to me that - -

JUDGE WEST: Yes or no.

THE WITNESS: Well - -

JUDGE WEST: You can give an explanation. Yes or No?

THE WITNESS: It came up while I was there.

JUDGE WEST: Okay. That's a Yes [?]

THE WITNESS: It sounded like it had been disposed of as a bargaining item.

JUDGE WEST: All right. So, you actually weren't present when that was discussed with the employer?

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THE WITNESS: Not the particulars of it, no.

In late 2004 Naugle spoke with Dave Mook, the new manager at CCM, about her seniority. Naugle explained the situation to Mook and asked him if he could check into her getting her original hire date of August 30, 2000. Mook agreed to check into it and said that he would get back to her on it.

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A few days later Mook told Naugle that as far as her seniority was concerned, it was the Union that was blocking it being reinstated; "the union was not allowing our seniority date to be reinstated to 2000." (transcript page 27)

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In the late fall/early winter of 2005 Naugle spoke with Ron DeWitt, who is Operations Supervisor, about her seniority. She testified that she asked him to look into her personnel files and find out if she had ever been terminated or if there was anything in writing indicating that she had resigned or was no longer employed between 2000 and 2002; that she made this request because someone in the Union in 2003, she could not remember who, told her that there was a letter in her file which indicated that she had resigned or quit; and that DeWitt said that he would check her files to see if there was anything in writing stating that she had ever been terminated or resigned.

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DeWitt, who is Operations Supervisor at CCM, testified that in late 2005 Naugle approached him and asked him if he would take a look at her file to see if there was any documentation showing that she had quit or she was terminated; that she told him that she needed some kind of proof that she was not let go or that she had not quit to satisfy the Union; that Naugle told him that there was speculation that she had something in her file that stated she had quit or she was terminated from employment; and that he told Naugle that he would look into the matter.

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In January 2006 Naugle had a conversation with McCarthy in the presence of DeWitt. Naugle testified that she had a conversation with McCarthy at CCM's facility about her seniority and whether her hire date was 2000 or 2002, that supposedly she had quit but there was nothing in writing in her file indicating that she had quit or had been terminated; that she asked McCarthy if the Union would have a problem with her getting her seniority reinstated; and that

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He said as far as he was concerned, if there was nothing in writing, it shouldn't be a problem to reinstate it. At that time Mr. DeWitt was there and he verified that he would be checking into my files to see if there was anything in writing stating that I had resigned or was terminated.

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Q. Did Mr. McCarthy say anything else?

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A. Yes, he did. He said that he would talk to the union stewards and get the opinions from the body [the involved bargaining unit members at CCM] as to how their feeling would be in being reinstated. [Transcript page 29]

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DeWitt testified that in early 2006 he witnesses a conversation between Naugle and McCarthy at CCM; that Naugle asked McCarthy about reinstating her seniority and McCarthy

said that "if there's nothing in her files, he didn't really see a problem with her getting her seniority back, having it reinstated. Then he also did state that he would have to bring it up to the body and discuss it with them and see how they felt on the issue" (transcript page 64); and that he told them that he could continue to look into the file and see if there was anything in it.

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McCarthy testified that on January 19 he met with the involved bargaining unit to introduce himself; that Naugle sought him out and when she had the opportunity to speak to him alone she told him that there was a problem with her seniority, she was listed in error, there had been a mistake, and she was hopeful that the mistake or oversight could be corrected; that he told Naugle that he would look into it, and he might have indicated some curiosity about whatever might be in the record; that he did not recall suggesting perhaps this was an issue that might be submitted in effect to the membership or to the group or whatever; and that "referring to our membership as the body isn't a term I would typically use" (transcript page 92)

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On cross-examination McCarthy testified that while he was conversing with Naugle DeWitt did approach them and he was present for some part of the conversation; that during this conversation Naugle raised the issue of the paperwork and she indicated that she wanted to be restored her seniority; that regarding whether he told Naugle that he did not have a problem with her having her 2000 seniority if there was no termination or quit paper in her file, "I - - not only do I not remember that, I don't believe I would have said that" (transcript page 106)

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On cross-examination McCarthy testified that he received the following, General Counsel's Exhibit 5, the first week in February 2006:

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COUNTY CONNECTION
MEMO

To: Bill Gunther, Roger Deitrick - CC Union Reps
From: Jan Pickering, Human Resources
Date: 2/2/2006
Re: Barb Naugle's seniority date

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This memo is to confirm that County Connection management requests that Barb Naugle be reinstated to her original hire/employment date for seniority purposes. Her original hire/employment date was August 30, 2000.

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Please confirm with Lyn [Knapp] and/or myself by no later than Thursday, February 9, 2006, that the union agrees to this request.

Thank you.

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McCarthy further testified he spoke with Pickering in the course of his investigation of Naugle's request; that during the course of a telephone conversation he had with Pickering she told him that she had prepared this memo for Deitrick and Gunther, she had yet to convey it to them, and he asked her, under the circumstances, to send it to him; that on February 7 he did not tell Pickering that there was not enough support within the union membership body for Naugle's seniority date to be changed; and that on February 7 he asked Pickering if she would confirm that the employer's position was that they would restore this seniority and what the basis of that was and then "I suggested she send me this memo" (transcript page 108).

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In February 2006 DeWitt told Naugle that he had been able to get into her files and there was nothing in writing saying that she had been terminated or that she had quit, and that her hire date on her records was August 30, 2000.

DeWitt testified that he inspected Naugle's file and there was no documentation in it indicating that Naugle had either quit or was terminated; and that he told Naugle that he looked into her file and there was nothing there.

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In mid-February 2006 Naugle spoke with McCarthy just before a union meeting at CCM. She testified that she asked McCarthy about her seniority; that McCarthy said that "he would have to get the opinions of the body. It would have to be brought up to the body as to what they felt about my seniority being reinstated [to August 30, 2000]" (transcript pages 31 and 32); that her seniority issue was not discussed at the union meeting that day; and that after the union meeting she asked McCarthy why her seniority issue was not brought up and he said that he was waiting for her to bring it up.

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On cross-examination Naugle testified that the union meeting occurred on February 18; that before the meeting she asked McCarthy about her seniority and he said that it would have to be brought up before the body and he would have to get the feeling on what the other drivers felt about her seniority being reinstated; that McCarthy suggested that he was referring to the new contract that was going to be negotiated; that she understood that McCarthy was referring to the contract that was to take effect sometime after October 2006; that it was her understanding the union wanted the other drivers to have a vote on whether or not her seniority should be reinstated with the new contract; that McCarthy did not raise the issue of her seniority at the February 18 union meeting; and that after the union meeting when she spoke with McCarthy he said that the issue was something that she would have to bring up before the members.

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McCarthy testified that between January 18 and the February 18 union meeting with the involved unit members he had occasion to discuss the question of Naugle's seniority with his Local Union predecessor, Doug Fogleman, and with stewards Deitrick and Gunther, both of whom were on the negotiating team; that he also spoke with Pickering; that subsequently he concluded that Naugle's concerns "did not have merit and that the local would not seek to have her seniority adjusted" (transcript page 93); that sometime in February before the February 18 union meeting with the involved unit employees, he spoke with Naugle on the telephone and he told her that he was still looking into it and he hoped to have an answer for her by the February 18 union meeting; that the purpose of the February 18 meeting was that the bargaining committee wanted to introduce him as the new business representative and to start preparations for the upcoming contract; that he did not talk with Naugle before or during the meeting, other than to perhaps greet her before the meeting; and that after the meeting concluded he met with Naugle and he told her that

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although she may feel there was a mistake made, it was most definitely not an oversight and that her seniority had been the subject of bargaining, had been established in bargaining and ratified and that I wasn't going to pursue a change. [Transcript page 95]

McCarthy testified that Naugle was disappointed and disagreed; and that he invited Naugle to raise her seniority issue as a prospective bargaining issue in the next union meeting.

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On cross-examination McCarthy testified that before the February 18 union meeting with the involved unit employees he had a conversation with Naugle and she told him that the employer indicated that there was nothing in her file that said that she had either quit or had been terminated so she wanted her seniority date to be changed; that he did not believe that he told Naugle on February 18 that the membership needed to vote on whether her seniority should be reinstated in that he did not believe that there was any discussion about membership

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taking action on Naugle's seniority until the meeting in March 2006; that he did suggest to Naugle that she could raise it in the next meeting, that it had already been scheduled as a bargaining issue; and that on February 18 he told Naugle that if the membership were to support a bargaining proposal regarding her seniority, then it could be made a subject of bargaining.

McCarthy testified that about 10 to 14 days before the March 11 union meeting with the involved unit employees Naugle left a voicemail for him informing him that she believed that the company had the right to adjust her seniority with or without the union's approval; and that he did not respond to this voicemail because he believed that Naugle was not soliciting a response.

On March 10 Naugle spoke with Pickering. Naugle testified that Pickering is the manager or supervisor of Human Resources for ETCM and CCM; that she spoke with Pickering in her office in Human Resources; that she asked Pickering if she could have something in writing indicating that there was nothing in writing in her, Naugle's, file stating that she had been terminated or resigned; that she wanted this document for a union meeting which was to take place the following day; that Pickering drafted a memorandum, General Counsel's Exhibit 3, and gave it to her; and that she made copies of the memo to hand out at the union meeting on March 11. General Counsel's Exhibit 3 reads as follows:

COUNTY
CONNECTION

MEMO

To: County Connection Union Employees
From: Jan Pickering, Human Resources
Date: 3/10/2006
Re: Barb Naugle's seniority date

This memo is to confirm that Barb Naugle's original hire/employment date was August 30, 2000. According to our records, Barb was never terminated, nor did she resign from her position at County Connection, when she was hired by Education and Training Connection as a School Bus Driver.
Thank you

DeWitt testified that on March 10 Naugle brought Pickering's memo to him to look at to make sure that there was nothing wrong with the memo; and that he told Naugle that the memo was fine.

Lynn Knapp, who is one of the founders of CCM and who is its President as well as CEO of ETCM, testified that Pickering, who is her Human Resources Director, showed her General Counsel's Exhibit 3 on March 10; and that she told Pickering that it was appropriate and she should give it to Naugle.

On March 11 a union meeting was held in the garage at CCM. Naugle testified that that she passed out copies of Pickering's above-described March 10 memo to the other drivers at the meeting; that before the meeting she was standing by McCarthy while he was having a conversation with Cheryl Dice, who drives for CCM; that Dice told McCarthy that Naugle's seniority "should have been handled by the union representatives and the company, not by the body, that it was not the way to handle this" (transcript page 36); that Dice told McCarthy regarding the vote to be taken in Naugle's seniority, "that this was not legal, that it shouldn't be handled this way" (Id. at 37); that McCarthy said "yes, it was the way that it was going to be

handled" (Id.); that McCarthy said that there would be a vote that needed to take place; that the union meeting was run by union officials McCarthy, Gunther, and Deitrick; that 15 to 17 employees were present at the meeting; that the topic of her seniority was discussed at this union meeting; that McCarthy brought the topic up when he said that there was something that she needed to talk to the body about; that she then spoke to the unit members, explaining her seniority issue and referring to the March 10 Pickering memo which indicated that there was no resignation or termination; that she explained that she had proof in writing that there was nothing in her file stating that she was terminated or that she had quit; that she told the drivers that her proper seniority date should be August 30, 2000 which was in Pickering's memo; that McCarthy held up Pickering's memo and said that "as far as he was concerned, it didn't mean anything" (Id. at 39); that McCarthy also said "[t]hat it was going to have to be decided by the union body as to whether or not this would be put on the agenda for negotiations for the new contract" (Id.); that McCarthy was referring to the contract which was expiring in October 2006; that Deitrick told the unit members that if she "was reinstated that ... [she] would go ahead of 10 or 11 other drivers that would be below ... [her] instead of above ... [her] on the seniority list" (Id. at 40); that someone commented that apparently papers are coming up missing out of files; that she made a motion for a vote to be taken; that McCarthy conducted the vote, indicating that the vote was for putting Naugle's seniority question on the negotiating agenda for the new contract; that the vote was conducted by a show of hands; that the vote was against putting her seniority question on the negotiating agenda for the new contract; and that she moved for a vote on her seniority because that was what McCarthy said that she had to do, it would have to be put out for a vote.

On cross-examination Naugle testified that at the March 11 union meeting she requested a vote to have her seniority issue put on the docket for the negotiations for the new contract; and that Respondent's Exhibit 1 is the circular that was posted prior to the meeting on March 11. The circular reads as follows:

Union Meeting
March 11, 2006 11:00
County Connection Garage
Contract Renewal Issues.
Election of the
Bargaining Committee

Naugle further testified that she understood that the purpose of the March 11 meeting was to discuss contract renewal issues as well as to elect a bargaining committee. On redirect Naugle testified that she made the motion on March 11 for the union members to vote on her seniority "[b]ecause Mr. McCarthy was basically leading me in that direction that it would have to be put before the floor." (transcript page 49) And on recross Naugle testified that on February 18 McCarthy told her that if her seniority issue was to be brought before the membership, that was something she would have to do.

Dice, who currently is an employee of CCM, testified that she was hired by CCM in 1996; that she is a driver and she is represented by the Union; that she was subpoenaed to testify at the trial herein; that on March 11 she had a conversation with McCarthy at CCM; that she asked McCarthy why the membership was voting on Naugle's seniority being reinstated, indicating to McCarthy that she had never heard of such a thing and she did not think it was right; that McCarthy said that it was in the contract, that they voted the contract in, and "that that particular article pertaining to membership voting could be negotiated" (transcript page 52); that the article or provision that McCarthy was referring to is "the section pertaining to membership voting on other member's issues" (Id. at 53); that she was present during the duration of the

union meeting; that the union officials present were McCarthy, Gunther, and Deitrick; that 10 to 15 employees were present at the union meeting; that after the union officials covered the topics for the meeting, they asked if anyone else had any issues or business and Naugle raised her hand; that Naugle said that she wanted to discuss her hire date and she was told that it needed to be presented to the membership; that Naugle handed out General Counsel's Exhibit 3; and that Deitrick then told the unit members

that he felt that the issue had been ... discussed several times and that it had been settled and [he] asked ... [Naugle] if she realized that if there was a vote taken, that ... whichever way the vote went, yes or no, that was it, and that if she did wind up being reinstated, that there were other drivers that they would have to do the same thing for and asked the membership if they would like these other drivers to come in and possibly jump 10 positions ahead of them. [Id. at 55]

Dice further testified that Naugle made the motion for the vote to take place and McCarthy conducted the vote; that McCarthy said something to the effect that the question presented was "[w]hether ... [Naugle's] seniority hire date should be reinstated to the original 2000 date" (Id. at 56); that it was her understanding that the vote would determine whether Naugle's hire date would be reinstated to 2000 instead of 2002; that the vote was conducted by a show of hands; that the unit members could see who raised their hand; that the outcome of the vote was that Naugle's hire date would not be reinstated to 2000.

On cross-examination Dice testified that she saw Respondent's Exhibit 1 posted on the bulletin board; that she understood that the purpose of the March 11 meeting was to discuss the new contract that was coming up, to receive new contract proposals; that when she spoke to McCarthy before the March 11 meeting he told her that Naugle's seniority was set forth in the contract, that there was a section in the contract that covered it; that McCarthy did not indicate that seniority could be discussed when the new contract came up for negotiation; that McCarthy said "that the way her [Naugle's] seniority issue was being handled coming - - going to the membership for a vote was covered in this contract. If we weren't satisfied with that, that that was an issue that could be negotiable in the next contract" (transcript page 58); that during the March 11 meeting a number of contract proposals were discussed; that McCarthy asked the unit members if there was anything else and Naugle raised her hand; that Naugle raised two issues, namely "[s]he asked for a vote pertaining to her seniority at that time and that that item in the contract should be looked at for the next contract" (Id. at 59); and that Naugle raised the issue and McCarthy did not raise the issue.

Harold Baker, an employee of CCM who drives a bus, was hired by CCM in August 2002. He testified that he was subpoenaed to testify at the trial herein; that he is a member of the Union; that he attended the union meeting at CCM on March 11; that the Union officials present were McCarthy, Deitrick, and Gunther; that 15 to 20 employees were present at this union meeting; that at some point in this meeting Naugle brought up her seniority; that McCarthy conducted a vote on Naugle's seniority; that it was his understanding that the vote was to determine if Naugle's original seniority would be reinstated; that the vote was by a show of hands; that he voted; that his seniority date on General Counsel's Exhibit 4 is September 3, 2002; that if Naugle's seniority was reinstated to 2000, he would have been adversely affected; that the vote was against Naugle's request.

On cross-examination Baker testified that Respondent's Exhibit 1 is the notice which was posted in advance of the March 11 union meeting; that he understood that contract renewal issues were to be discussed at the March 11 meeting; that a number of the people at the meeting discussed ways to modify, amend, or change the terms of the contract; that the

proposals were discussed and debated at some length; that at one point McCarthy asked if there were any further proposals; and that at that point Naugle stood up.

McCarthy testified that when he arrived early for the March 11 union meeting with the involved unit members Naugle approached him in the parking lot and asked him if he would be accepting proxies or absentee ballots on her issue; that he reminded Naugle that the group in their previous meeting had authorized absentee voting for bargaining team representatives only and he was not inclined to accept absentee ballots for an issue that hadn't been raised yet, hadn't been framed as a motion yet, and the group had not authorized it; that about 20 people attended the March 11 meeting; that the meeting lasted between 1 hour and 90 minutes; that a number of different contract proposals were submitted; that contrary to the recollection of others, Naugle's issue came first; that Naugle told the membership that she had never quit and the employer was willing to restore her original seniority date or make her seniority date correspond to her first hire date and that if management was willing to do it that we should do it; that from what Naugle told the membership it was difficult to ascertain if Naugle was proposing that the change in her seniority date was going to be done immediately or prospectively and so he tried to recap her motion in a way that he understood it, Naugle would agree, and the membership would understand before voting; and that he told the membership that

this would be for purposes of bargaining. It would become a bargaining issue if the group supported it, and I made it clear it would not have the effect of giving immediate change or adjustment to her seniority date. [Transcript page 99]

McCarthy further testified that he asked Naugle if he had recapped it accurately and she indicated that she was content that he had; and that the vote was overwhelming against visiting this issue in bargaining.

On cross-examination McCarthy testified that he attended some of the negotiating meetings for the collective-bargaining agreement between the Union and CCM; that he has reviewed the contract and there is nothing in the contract which states that issues regarding an employee's seniority must be voted on by the membership; that he had a conversation with Dice on March 11 before the union meeting with the involved unit employees; that Dice told him that the Union was wrong for the way it was treating Naugle; that Dice said something like she had never heard of a case where the membership had to vote on whether someone's seniority date should be changed; that he did not think, he did not recall, that he told Dice that that was perfectly legal and this is how it is going to be done; that he did not tell Dice that the membership had to vote on Naugle's seniority; that he officiated over the March 11 union meeting; that he saw a copy of General Counsel's Exhibit 3 on March 11 as the meeting was about to begin; that in Respondent's April 24 position statement to the National Labor Relations Board (Board) he indicated that the employer had issued Naugle a memo (General Counsel's Exhibit 3) which he believed could be construed to amend Naugle's seniority to confirm with her original date of hire; that he construed the March 10 memo to be the employer's offer to amend Naugle's seniority date; that at the March 11 union meeting he held up a copy of the March 10 memo and said that as far as he was concerned, this memo means nothing; that he did conduct a vote on the issue of Naugle's seniority on March 11, saying something like if the Union adopted Naugle's position that her seniority date be reinstated we all know what the employer's position is going to be; that he recapped Naugle's motion, saying Naugle's request to have her seniority restored and the seniority list revisited in bargaining would be for the purposes of a proposal and that would not have an immediate effect; and that the vote was against the motion to make that a bargaining proposal.

Subsequently McCarthy testified that on March 11, before the vote was taken on

Naugle's seniority, Deitrick spoke to the membership as follows:

5 Well, he had some pretty specific recall about how this was disposed of as a bargaining issue and he reminded the group that the mystery of Barb [Naugle] being gone and then coming back was very similar to the way two other persons had during the same course of time been employed elsewhere and come back, and that the union had been willing to restore original seniority for all three of them, but not only one of them, and that's how the item got disposed of in bargaining. The employer was not willing to restore seniority for all three of them. So, the seniority dates became what they became. [Transcript page 121]

10 On cross-examination McCarthy testified that on March 13 he notified Pickering that the Union was not willing to amend Naugle's seniority; that this decision was not based upon the vote that had occurred on March 11; that he told Pickering this on March 13 "[b]ecause I had yet to communicate that to her"(transcript page 117); and that the March 11 vote was explicitly for a bargaining proposal and had nothing to do with his communication to Pickering on March 13.

15 Knapp testified that in mid-March 2006 McCarthy, during a telephone conversation regarding several grievances, told her that it was important that she rescind Pickering's March 10 memo regarding Naugle's seniority (General Counsel's Exhibit 3); and that she said that there was nothing in the memo to rescind, and she believed that she told McCarthy that she would get back with him.

20 McCarthy testified that he did ask Knapp to rescind Pickering's March 10 memo (General Counsel's Exhibit 3) offering as a rationale the fact that he thought a reader could understand it to restore Naugle's seniority, he asked Knapp if that was the purpose, and Knapp deferred any answers to the grievance meeting that they had coming up.

25 On cross-examination McCarthy testified that he did not ask Knapp to rescind the March 10 memo until after the March 11 vote because he did not see the memo until the March 11 vote.

30 On April 10 or 11 Knapp attended a grievance meeting, along with Gary Patterson, who is the company lawyer, Pickering, DeWitt, McCarthy, Deitrick, and Gunther. Knapp testified that the meeting was held at ETCM in the conference room; that toward the end of the meeting McCarthy said that the memo regarding Naugle's seniority had to be rescinded; and that she said there was nothing in the memo to rescind; it was simply a statement of fact.

35 DeWitt testified that he attended a grievance meeting on April 10 or 11; that others present at this meeting were Gunther, Deitrick, McCarthy, Pickering, Knapp, and Patterson; that at the end of this meeting McCarthy said that he wanted CCM "to retract the memo that we gave ... [to Naugle] and ... he wanted something in writing stating that the company would not, in no shape or form reinstate her seniority" (transcript page 67); and that Patterson told McCarthy that there was nothing in the memo stating that CCM was going to give her her seniority back, and all it was was the fact that that was her actual hire date when she was hired by CCM.

40 On cross-examination DeWitt testified that Knapp signed the collective-bargaining agreement which is in effect until September 30, 2006, General Counsel's Exhibit 2, and which has Naugle's seniority date as December 2, 2002.

45 McCarthy testified that he attended a grievance meeting on April 10, along with Knapp, Pickering, Patterson, DeWitt, Gunther, and Deitrick; that during the meeting he asked for an

answer to his request that Pickering's March 10 memo regarding Naugle's seniority be rescinded; that he explained that it was easy to read that memo as extending to Naugle the consideration to her seniority request that he thought would be in violation of the contract; that Patterson indicated that all CCM was doing is confirming that this was her original hire date, that there was nothing in the letter that was untrue and he seemed reluctant to rescind it; that he asked Patterson if he would clarify it and Patterson said that he was willing to clarify it and put in writing the fact that this was not to be understood as an attempt to alter Naugle's seniority date; that he has never received such communication; and as of the date of the trial herein, Naugle's hire date, as demonstrated by General Counsel's Exhibit 4, remains "12/2/2002."

On cross-examination McCarthy testified that he asked the Employer to rescind the March 10 memo because the Union was not willing to take the position that Naugle's seniority should be changed to her original date of hire; that he did not tell the Employer this on April 10 because the membership was surveyed on March 11; that he brought the matter up on April 10 because Knapp had deferred her answer until this meeting; and that on April 10 he asked the employer to clarify what was said to him, which was that this memo did not have the effect of changing her seniority date.

Subsequently McCarthy gave the following testimony:

JUDGE WEST: Okay. Let me ask you this as a matter of curiosity on my part, it would seem that your position is that the seniority list which is attached to General Counsel's Exhibit 2, the collective-bargaining agreement we just discussed, that could only be changed by having the membership vote on whether they want to renegotiate that seniority list with respect to an upcoming collective-bargaining agreement?

THE WITNESS: Well, I know it's a legitimate subject of bargaining for a contract renewal, so, yeah, they could, I mean, they could decide whether it's a bargaining proposal for our group or not.

JUDGE WEST: Okay. What if, hypothetically, there was a mistake on that list, could that mistake be corrected or would that remain a mistake unless and until the membership voted to include this in the negotiation for a new contract?

THE WITNESS: No, I believe a mistake could be corrected.

JUDGE WEST: Okay. Normally, aside from a collective-bargaining agreement, normally the employer is the one who decides the hire date, is that correct?

THE WITNESS: Yes.

JUDGE WEST: And yet it's your position, I guess, that the employer gave up the right to decide the hire date of Charging Party because it entered into this collective-bargaining agreement?

THE WITNESS: Well, that Appendix is referred to in the seniority section of the agreement. It is by reference part of the agreement.

JUDGE WEST: All right, let's - - show me exactly where it is referred to.

....

THE WITNESS: 9.6 [Transcript pages 122 - 124]

Counsel for General Counsel and Respondent stipulated that General Counsel's Exhibit 4 is the seniority list as of the date of the trial herein, namely July 18.

5

Contentions

Counsel for General Counsel on brief contends that McCarthy recapped Naugle's motion in a way that the membership understood that the vote would determine whether Respondent should adopt Naugle's position that her seniority should be reinstated during bargaining for the successor collective bargaining contract; that McCarthy's testimony that he said that the vote would determine whether Naugle's seniority would be an issue in bargaining for the next contract is not credible as it is inherently inconsistent with the testimony of the other witnesses that testified regarding their recollection of the March 11 meeting; that McCarthy phrased his recap in such a way that the members understood that if they voted yes, the Union would take the position that Naugle's seniority would be reinstated during bargaining for a successor agreement; that McCarthy's assertion at trial that he came to a determination regarding Naugle's seniority based on the consultation with Respondent's officials rings hollow; that McCarthy's post-March 11 conduct with regard to taking steps to block Naugle's seniority date from being amended must have been related to the vote that occurred on March 11; that Naugle had never left the employ of the Employer since her original date of hire; that the Union let the membership decide what the Union's position should be; that the membership was full of self-interested individuals, some of whom would be adversely affected if Naugle's seniority date would have been amended to August 30, 2000, which would have moved her up 10 spots on the seniority list; that Deitrick pointed this out to the membership before they voted; that Deitrick did not testify at the trial herein to deny making the statement and, therefore, it is not refuted; that in *General Truck Drivers Local 315*, 217 NLRB 616 (1975) the Board found that conduct similar to the conduct of the Union herein violated Section 8(b)(1)(A) of the Act because there the union decided the issue before it by having those employees who could be adversely affected by the resolution of the issue, notwithstanding their obvious conflict of interest, vote to decide the issue; that unions may not make determinations regarding their members' seniority rights solely for stronger, or the politically favored group, or the more numerous group, or the group who had been union members for a longer period of time, at the expense of a minority group without running afoul of Section 8(b)(1)(A), *Barton Brands, Ltd.*, 228 NLRB 889 (1977) and *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974 (1986); that Respondent unlawfully delegated its responsibility to fairly represent Naugle to a group of self-interested voters; that Respondent failed to show any objective justification for its conduct besides that of placating the desires of the self-interested majority at the expense of the Charging Party; and that conducting a vote that determined Respondent's official position at any time regarding Naugle is unlawful because Respondent unlawfully delegated its responsibility to be fair to Naugle.

Respondent on brief argues that there are two fundamental differences between *General Truck Drivers Local 315*, supra, and the instant case; that here the Union did not abdicate its responsibility to deal with the issue of Charging Party's seniority since McCarthy, after conducting a full and fair investigation, told Naugle that her concerns did not have merit and the Union would not attempt to have her hire date adjusted; that McCarthy did not violate the Act when he told Naugle of her right to attend the March 11 meeting and express any views, arguments or opinions she might have; that in *General Truck Drivers Local 315*, supra, the Board was confronted with an issue involving contract administration and in the instant case the dispute involves contract negotiation; that the motion submitted by Naugle on March 11 to the membership did not deal with the application or interpretation of any provision of the 2003-2006 agreement but rather dealt with whether the issue of her seniority should be submitted as a

bargaining demand during negotiations for the new contract; that because different groups of employees have different priorities and different concerns, unions must have the authority to resolve these differences; that as long as decisions are made in good faith and are not based on impermissible factors, unions are afforded a wide range of reasonableness; that in contrast to contract administration, contract negotiation requires greater union flexibility and discretion; that neither *General Truck Drivers Local 315*, supra, nor any other court or Board decision can be cited for the proposition that a union breaches its duty of fair representation by submitting proposals for a new contract to the membership for approval; and that as a matter of law, the Union is mandated to submit any such proposal agreed to at the bargaining table for approval by the membership.

Analysis

Before beginning the analysis it is necessary to point out that I do not find the only witness called by the Union, McCarthy, to be a credible witness. His testimony was contradicted by witnesses who I find to be credible. No one was called by the Union to corroborate McCarthy's testimony. McCarthy impressed me as being a manipulative individual, and as can be seen from the transcript quoted above, the truth had to be painstakingly extracted from him as to whether he participated in the collective-bargaining agreement negotiations with CCM regarding the seniority issue involved herein. Eventually he admitted that he did not. Notwithstanding this, the Union did not call any witness who did participate in the collective-bargaining agreement negotiations regarding the seniority issue involved herein. Naugle was not present at the collective-bargaining agreement negotiating session or sessions involving her seniority issue, so her testimony about her understanding of what occurred comes from what Fogleman told her and a group of assembled employees at a union meeting in the summer of 2003, months before final agreement was reached on the collective-bargaining agreement. Fogleman was not called to testify at the trial herein. Neither was Deitrick, who was on the negotiating team and who told Naugle in June 2003 long before the collective-bargaining agreement was signed that her seniority was not going to be reinstated to August 30, 2000

Both DeWitt and Naugle impressed me as being credible witnesses. Their testimony about Naugle's January 2006 conversation with McCarthy is credited. McCarthy told Naugle at that time that if there was nothing in her personnel file indicating that she had quit or been terminated, he did not really see a problem with her getting her original date of hire reinstated. However, McCarthy also told Naugle at this time that he would have to talk with the union stewards and he would bring it up to the body and discuss it with them and see how they felt on the issue. As noted above, with respect to whether he told Naugle that if there was nothing in her personnel file indicating that she had quit or been terminated, he did not really see a problem with her getting her original date of hire reinstated, McCarthy claimed that "I - - not only do I not remember that, I don't believe I would have said that" (transcript page 106). This equivocal testimony from a witness who is not credible does not refute unequivocal testimony from two witnesses who are credible. Also, McCarthy claimed that he did not recall saying that he would bring it up to the body and discuss it with them and see how they felt on the issue. Both McCarthy's do "not recall" claim and his "would not typically use" the term body to refer to the membership claim are not credited. Both of these claims are equivocal and do not refute the unequivocal testimony of two credible witnesses.

McCarthy concedes that he received the February 2 CCM memo indicating as follows:

This memo is to confirm that County Connection management requests that Barb Naugle be reinstated to her original hire/employment date for seniority purposes. Her original hire/employment date was August 30, 2000.

Please confirm with Lyn [Knapp] and/or myself by no later than Thursday, February 9, 2006, that the union agrees to this request.

- 5 However, McCarthy did not reply to this memorandum by February 9. Indeed, McCarthy did not reply, in effect, for about 30 days or until after the involved bargaining unit members at CCM voted on March 11.

10 Naugle's testimony that on February 18 it was her understanding from what McCarthy told her that the Union wanted the other drivers to have a vote on whether or not her seniority should be reinstated with the new contract is credited. McCarthy's testimony that he did not believe that he told Naugle on February 18 that the membership needed to vote on whether her seniority should be reinstated in that he did not believe that there was any discussion about membership taking action on Naugle's seniority until the meeting in March 2006 is not credited.

15 As noted above, McCarthy's subsequently asserted that he told Naugle on February 18 that if the membership were to support a bargaining proposal regarding her seniority, then it could be made a subject of bargaining, and she had to bring up the issue on March 11. It is not quite clear why Naugle's seniority would have to be made a subject of bargaining. Only one side had not yet made up its mind. CCM wanted to change Naugle's hire date to August 30, 2000. It

20 indicated to McCarthy and the two union stewards at CCM that it wanted to make this change. It asked the Union to reply by February 9 and yet the Union had not replied when McCarthy assertedly made this statement to Naugle on February 18. The only bargaining that might have taken place is if the Union believed that it could once again use Naugle's situation as leverage. It did not succeed before in taking this approach. The Union did not indicate why it believed

25 there would be a change. Since McCarthy did not respond to CCM's February 2 memorandum even by February 18, what he said to Naugle should be viewed as nothing more than his way of getting Naugle to supposedly act on her own at the next Union meeting.

30 Both Naugle and Dice testified that on March 11, before the meeting began, Dice told McCarthy that she had never heard of the membership voting on an employee's seniority being reinstated, she did not think that it was right (Naugle testified that Dice said it was not legal.), McCarthy told Dice that the membership was going to vote on the matter, and the membership did vote on the matter. McCarthy's testimony that that he did not think, he did not recall, that he told Dice that this is how it is going to be done, it is legal, and that he did not tell Dice that the

35 membership had to vote on Naugle's seniority is not credited. McCarthy is not a credible witness. His testimony in this instance is both equivocal and contrary to the facts. He told Naugle that she had to be the one to put the issue before the membership for a vote, he rephrased Naugle's motion, and the membership did indeed vote on the question of Naugle's seniority. The testimony of Naugle and Dice regarding what Dice and McCarthy said is credited.

40 The testimony of McCarthy on this issue is not credited.

As here pertinent, with respect to what McCarthy and Deitrick said at the March 11 union meeting, Naugle testified that (a) McCarthy told the membership (1) that the March 10 Pickering memo did not mean anything, and (2) it was going to have to be decided by the union body as

45 to whether or not Naugle's seniority question would be put on the negotiating agenda for the new contract, and (b) Deitrick told the membership that if Naugle's August 30, 2000 hire date was reinstated, she would go ahead of 10 or 11 drivers who at that time were above her on the seniority list. Dice testified that Deitrick told the membership that possibly 10 drivers would be jumped on the seniority list and McCarthy told the membership that the question presented was

50 whether Naugle's seniority date should be reinstated to the original 2000 date. Baker testified that it was his understanding that the vote was to determine if Naugle's seniority would be reinstated. Baker did not testify regarding what Deitrick told the membership. As noted above,

Deitrick did not testify at the trial herein. Naugle's and Dice's testimony regarding Deitrick telling the assembled membership about the possibility of 10 unit members being adversely affected by the outcome of the vote is credited. It is noted that while McCarthy testified about what Deitrick told the involved membership on March 11, McCarthy failed to mention Deitrick's reference to the possible adverse consequences to 10 of the involved members. It is also noted that the employees who were there and who testified at the trial herein did not testify that Deitrick spoke to the membership in terms of the matter becoming a bargaining issue. Indeed two of the three employees who were there and who testified at the trial herein, Dice and Baker, testified that it was their understanding that the vote was to decide whether Naugle's hire date would be reinstated to 2000. Naugle, who had discussed her situation with McCarthy beforehand, testified that McCarthy told the membership that it was going to have to be decided by the union body as to whether or not this would be put on the agenda for negotiations for the new contract, and McCarthy said that the vote was for putting Naugle's seniority question on the negotiating agenda for the new contract. Only McCarthy testified that he told the membership that the vote "would be for purposes of bargaining. It would become a bargaining issue if the group supported it, and I made it clear it would not have the effect of giving immediate change or adjustment to her seniority date." (transcript page 99) If the only thing the members were voting on was whether it would even become a bargaining issue - something to be discussed at the future negotiating sessions, it is not clear why Deitrick would have made the statement he did. If the members were only voting on whether Naugle's seniority was even going to be a bargaining issue, on March 11 it would have been premature to be discussing the possible adverse affects on 10 unit members. Apparently Naugle's seniority was a bargaining issue in 2003 and her seniority did not change. So if the membership was only voting on whether Naugle's seniority was going to be a bargaining issue, there would not have been any need for Deitrick to cause alarm among the membership. But two of the employees who voted and testified at the trial herein understood that what they were voting on was whether Naugle's seniority should be reinstated to 2000. Dice and Baker understood that this is what they were voting on. Deitrick's statement left the impression that this was all the membership was voting on. Naugle's understanding was that the vote was for putting her seniority question on the negotiating agenda for the new contract. Only McCarthy testified that he told the membership that Naugle's request to have her seniority restored and the seniority list revisited in bargaining would be for the purpose of a proposal and that would not have an immediate effect - "[i]t would become a bargaining issue if the group supported it, and I made it clear it would not have the effect of giving immediate change or adjustment to her seniority date." (transcript page 99) McCarthy achieved what he wanted; he used the membership to justify denying the request. And he used Naugle to get the justification. McCarthy and Deitrick manipulated the situation to achieve the results they wanted.

Not until he had Naugle's seniority issue voted on by the membership on March 11 did McCarthy respond to CCM's February 2 memo which indicated that CCM wanted to reinstate Naugle's hire date to August 30, 2000. McCarthy testified that his notification to Pickering that the Union was not willing to amend Naugle's seniority was not based upon the March 11 vote, he told Pickering this on March 13 "[b]ecause I had yet to communicate that to her," (transcript page 117) and the vote had nothing to do with his communication to Pickering on March 13. McCarthy's testimony that he told Pickering this on March 13 "[b]ecause I had yet to communicate that to her," (Ibid) is not only obvious but it begs the question. With Pickering's February 2 memorandum CCM sought the Union's agreement to reinstate Naugle's to her original hire date, August 30, 2000. McCarthy waited until March 13 to reply to this request. Why? McCarthy waited until after the March 11 membership vote. Why? McCarthy did not explain other than to testify that he told Pickering on March 13 "[b]ecause I had yet to communicate that to her." (Ibid) Was the delay occasioned by McCarthy's manipulations to have the subject treated as a negotiation subject and not a contract administration subject? McCarthy

framed the issue and now the Respondent argues that we have to accept McCarthy's approach; namely that the issue was a negotiation issue and not a contract administration issue. The facts speak for themselves. The involved issue was a contract administration issue and McCarthy, for his own purposes, converted it to a contract negotiation issue and had Naugle present it to the membership for him.

The Board in *General Truck Drivers Local 315*, supra, at 617 - 619 concluded as follows:

When a majority of this Board decided in *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), that a union's breach of its duty of fair representation constituted a violation of Section 8(b)(1)(A) and, under certain circumstance, Section 8(b)(2) of the Act, it also spelled out to some extent its understanding of that duty. As the Supreme Court noted in *Vaca v. Sipes*, 386 U.S. 171, 181 (1967), the Board had adopted and applied the doctrine of the duty of fair representation as developed by the Federal courts. Pertinent to the instant case, the Board adopted the concept, quoted from an opinion of the United States Court of Appeals for the District of Columbia Circuit, that the duty is 'in a sense fiduciary in nature.'

Whatever the precise outlines of this duty, a subject of scholarly debate of long standing, its fiduciary nature connotes some degree of affirmative responsibility with regard to the allocation of benefits the union has secured for the employees in a collective-bargaining agreement. At least as to right under an existing agreement, the duty of fair representation is more than an absence of bad faith or hostile motivation. So much is implicit in *Miranda Fuel* itself, where the majority found a breach of the duty because the union caused the forfeiture of an employee's seniority status, to which he was entitled under the contract, and the union's action was based on pressure asserted by other employees to persuade it to do so. There was no finding of hostility toward the employee affected, of bad faith in the union's assertion of its erroneous contract interpretation (although the facts might have justified such a finding), or of any other unlawful motivation on the part of the union. The union's violation consisted simply, in the words of the Board majority, in violating the employee's 'right to fair and impartial treatment from his statutory representative.'

Another way this elusive element of the duty of fair representation has been authoritatively described is the avoidance of arbitrary conduct. Here again, although phrased in negative terms, the duty is to some extent an affirmative one, for a common characteristic ... [of] arbitrariness is the *absence* of some ingredient in the decision making process. What that ingredient may be, in the context of the duty of fair representation, has only begun to be examined by the Federal courts. One significant statement describing the duty of unions not to be arbitrary comes from the late Judge Sobeloff, writing for the Fourth Circuit:

A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. [*Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, 469 F.2d 181, 183 (4th Cir. 1972)]

.... And if a duty to avoid arbitrary conduct, as part of an affirmative, fiduciary responsibility, means anything, it must mean at least that there be a reason for action taken.

.... In the instant case, like *Miranda Fuel*, the Union acted affirmatively to deprive an employee of a claimed contractual right which was recognized by the Employer.

....

.... And most importantly, the voting on this issue was limited to those, and only those, who would be adversely affected by a vote to permit the bumping. That is, the election itself was designed so that it could express, not fairness, but only the conflict of interest of each member of the electorate.

The duty of fair representation being an affirmative duty, the obligations it encompasses cannot be avoided by delegating this authority to make decisions. Here the Union in effect delegated this authority to a group of its members. It could not, however, abdicate the responsibility for fair treatment of the employees affected by the decision. By selecting the method for determining its action the Union underwrote the fairness of the method. ... the method was not fair. We hold that it did not meet the minimum statutory standard of fairness.

Here, notwithstanding the Union's arguments to the contrary, what McCarthy did was take the same approach the union took in *General Truck Drivers Local 315*, supra. His attempt to cloak his approach in terms of preparing to negotiate a new contract, as opposed to administering the one in existence in February 2006, is transparent. The only difference between the instant case and *General Truck Drivers Local 315*, supra is a difference without meaning. There, all of those who voted would be adversely affected by a vote to permit bumping. Here, we know that the unit had 33 employees in it at the time of the signing of the contract, General Counsel's Exhibit 2. We also know that at the time of the trial herein the unit had 31 employees, General Counsel's Exhibit 5. We do not know, however, with certainty how many employees were in the unit on March 11. Naugle estimates that 15 to 17 employees were present on March 11. Dice estimated the number of employees present to be 10 to 15. Baker's estimate of the number of employees present is 15 to 20. And McCarthy estimates that about 20 people attended the March 11 meeting. If Naugle's date of hire is August 30, 2000 then she would move ahead of 14 to 15 [depending on whether Naugle had the higher number when the last four digits of her social security number were compared to the social security number of another employee who also has a hire date of August 30, 2000 (See Article IX, Section 9.1 of the collective-bargaining agreement)], employees on the seniority list attached to the collective-bargaining agreement, General Counsel's Exhibit 2. Assuming arguendo that Deitrick was correct in his assertion on March 11 that the change in seniority would involve 10 employees being adversely affected, this would mean that approximately one-third of the involved unit would be adversely affected by a vote in favor of Naugle. We do not know how many of the 10 employees who would be adversely affected were present on March 11 when the vote was taken. Counsel for General Counsel did call one as a witness, Baker. Nonetheless, the approach taken - namely giving an employee or employees who have a conflict of interest the opportunity to vote on an issue is inherently flawed. The method cannot be considered fair. The Respondent did not meet the minimum statutory standard of fairness. McCarthy did not believe that the change was a problem until he spoke with the stewards. Then McCarthy concocted the scheme to have Naugle seek a vote from employees who Deitrick would first place on notice that many of them would be adversely affected if they sided with Naugle. The Respondent violated the Act as alleged in the complaint.

Conclusions of Law

By on March 11 putting the Charging Party's issue of her assigned seniority/hiring date

to a vote of Respondent's membership who are employed by the same employer as Charging Party and accepting their vote as its position on the issue where it could be foreseen and assumed that the employees would vote their self interest, thereby breaching its duty of fair representation by delegating its responsibility as the exclusive collective bargaining representative to its membership, the Union has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The complaint also requests that Respondent be ordered to "[a]ffirmatively decide its position concerning the Charging Party's seniority/hire date on its merits and not by a membership vote." The request is reasonable.³

³ It appears that Naugle's situation was used as leverage by the Union in negotiations for the 2003-2006 collective-bargaining agreement. In other words, apparently CCM was willing to give Naugle her original hire date of August 30, 2000 because (1) she had not obtained any other regular and substantially equivalent employment elsewhere after she was laid off by CCM in January 2002 but rather had just continued to work for CCM's affiliate ETCM, which is what she was doing while she drove for CCM before she was laid off, (2) Naugle remained an employee of CCM between January and December 2002, and (3) Naugle actually was recalled and not rehired. Apparently CCM was not willing to restore the original date of hire for two other employees because when they were laid off they became employed elsewhere. There must have been a question as to whether the other two employees, unlike Naugle, had given up their recall rights, CCM wanted to continue to treat the other two as new hires, and CCM was unwilling to give the two other employees their original date of hire. The Union apparently then unsuccessfully used Naugle's situation as leverage to get CCM to change its position with respect to the other two employees, taking an all or none approach. But again no one who actually participated in the negotiations was called as a witness and asked exactly what happened on this issue during the negotiations for the 2003-2006 collective-bargaining agreement. Apparently both stewards Deitrick and Gunther were on the negotiating team and yet neither was called as a witness. It appears that one of the witnesses called by Counsel for General Counsel, Knapp, did participate in these negotiations but she was not asked about the specifics with respect to the seniority issue.

On the one hand, seniority is defined by the collective-bargaining agreement. On the other hand, an employee's date of hire is what it is. A collective-bargaining agreement should not be used to perpetuate a mistake. Here apparently McCarthy believes that since CCM included a date of hire on the seniority list which was attached to and referred to in a collective-bargaining agreement, CCM is precluded from unilaterally changing the hire date which appears on that seniority list. McCarthy testified that normally the employer decides the hire date but where, as here, the employer agreed to a seniority list based on specified hire dates, a hire date on the seniority list cannot be changed without the agreement of the Union. McCarthy conceded that if the hire date on the seniority list was a mistake it could be corrected. This could be done without seeking the approval of the Union. If CCM was mistaken in not treating Naugle as a recalled laid off employee in December 2002, and giving her her original date of hire upon her recall since she did not do anything to lose it, then would it not be appropriate for CCM to correct this mistake?

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Local 547, International Union of Operating Engineers, AFL-CIO, of Detroit, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Putting the Charging Party's issue of her assigned seniority/hiring date to a vote of Respondent's membership who are employed by the same employer as Charging Party and accepting their vote as its position on the issue where it could be foreseen and assumed that the employees would vote their self interest, thereby breaching its duty of fair representation by delegating its responsibility as the exclusive collective bargaining representative to its membership.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Affirmatively decide its position concerning the Charging Party's seniority/hire date on its merits and not by a membership vote.

(b) Within 14 days after service by the Region, post at its involved union hall, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 2006.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by County Connection of Midland, if willing, at all places where notices to employees are customarily posted.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C., September 19, 2006.

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John H. West
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT have you vote on the issue of an employee's assigned seniority/hiring date and accept your vote as our position on the issue where it could be foreseen and assumed that you would vote your self interest, thereby breaching our duty of fair representation by delegating our responsibility as the exclusive collective bargaining representative to you.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL affirmatively decide our position concerning Barbara Naugle's seniority/hire date on its merits and not by a membership vote.

Local 547, International Union of Operating
Engineers, AFL-CIO

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300
Detroit, Michigan 48226-2569
Hours: 8:15 a.m. to 4:45 p.m.
313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.

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